

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. 123401561
AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Dov AXEL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1952

Dov AXEL

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 3 August 1972, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for one month on six months probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a Wiper on board the SS STEEL MAKER under authority of the document above described, on or about 29 May 1972, Appellant assaulted the Chief Engineer with a chair.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence excerpts from the shipping articles and the official ship's log and the testimony of the Chief Engineer and the Third Mate.

In defense, Appellant offered in evidence copies of medical reports and the testimony of the Saloon Messman and himself.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and one specification had been proved. He then served a written order on Appellant suspending all documents issued to him for a period of one month on six months' probation.

The entire decision was served on 15 August 1972. Appeal was timely filed on 21 August 1972.

FINDINGS OF FACT

On 29 April 1972, Appellant was serving as a Wiper on board the SS STEEL MAKER and acting under authority of his document while

the ship was in the port of Singapore.

On that date the Chief Engineer asked Appellant to come to his room. When Appellant arrived, the Chief Engineer began to discuss what he considered to be malingering on Appellant's part. The discussion became heated and Appellant got up to leave. The Chief Engineer told him to sit down whereupon Appellant grabbed a chair and lifted it over his head. However, before he could do anything with it, the Third Mate, who had been in the room the entire time, took it away. Appellant then went ashore and reported the incident to the police.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Although the brief is rather extensive with considerable comment, the arguments appear to be reducible to the following:

(1) That there is no substantial evidence of a reliable and probative nature to support the findings;

(2) That the actions of Appellant were based on a fear of harm due to the belligerency of the Chief Engineer and therefore should be condoned;

(3) That the log entry was not made in accordance with statutory requirements and therefore not admissible in evidence.

APPEARANCE: Appellant, by William Rosenthal, Esq.

OPINION

Appellant's first two points on appeal are basically attacks on the Administrative Law Judge's determination as to the credibility of the witnesses and the weight of the evidence. The Administrative Law Judge, as trier of facts, is the judge of both of these factors. He is free to accept or reject the testimony of any witness so long as his final decision is supported by substantial evidence. The question of weight to be accorded the evidence is for the Administrative Law Judge to determine and, unless it can be shown that the evidence upon which he relied was inherently incredible, his findings cannot be against the weight of the evidence. The test is whether a reasonable man could have made the same findings, not whether he would have agreed with these findings.

In the instant case the Administrative Law Judge chose to believe the Third Mate rather than the Appellant, and he refused to find that Appellant's actions were based on fear due to the

belligerency of the Chief Engineer. Both of these determinations were within the province of the Administrative Law Judge and the record does not reflect any justification for finding him in error. In light of these determinations, there is substantial evidence on the record to support the findings.

The record indicates that the log entry made pertaining to the incident was not made until two days later and that the entry was never read to Appellant, Thus the log entry does not meet the requirements of 46 U.S.C. §702. This means that the log entry cannot be used to make out a prima facie case against Appellant. Even so, it is still admissible into evidence and is normally accorded some weight by the Administrative Law Judge. In this case the Administrative Law Judge did not consider the log entry in making his findings on the charge of assault against Appellant; he relied on hearing and evaluating the testimony of the parties concerned. Consequently, there was no error in admitting the log entry into evidence.

ORDER

The order of the Administrative Law Judge dated at New York, New York on 3 August 1972, is AFFIRMED.

C. R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 21st day of June 1973.

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